BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN DAVID SASAKI	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,042,489
TOPEKA INDEPENDENT LIVING CENTER	)	
Respondent	)	
AND	)	
	)	
TECHNOLOGY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the March 27, 2009, Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts (ALJ). Claimant was awarded medical and psychological treatment and temporary total disability (TTD) after the ALJ determined that claimant was an employee of respondent and suffered an accidental injury on May 12, 2008, which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, George H. Pearson of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Bart E. Eisfelder of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Discovery Deposition of John D. Sasaki taken November 19, 2008, with attachments; the transcript of Preliminary Hearing held March 26, 2009; and the documents filed of record in this matter.

ISSUES

1. Did the ALJ exceed her jurisdiction in granting benefits to claimant under the Kansas Workers Compensation Act (Act)?

2. Was there an employee-employer relationship between claimant and respondent on May 12, 2008, the alleged date of accident?

3. Did claimant suffer an accidental injury on May 12, 2008, which arose out of and in the course of his employment with respondent?

4. Did the ALJ err in awarding TTD and medical benefits to claimant for the accident on May 12, 2008?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should be affirmed. Claimant began working as a personal care attendant for the Kansas Department of Social and Rehabilitation Services (SRS), working with a disabled individual named Ronald Brett Anderson, in approximately 1990. At some point, in the mid 1990s, the SRS decided to privatize the care attendant program. Mr. Anderson's name, along with the names of other SRS clients, was sent to area home community based service companies. Mr. Anderson then became a client of respondent. Claimant filled out an employment application with respondent, provided respondent with his drivers license and social security number, and underwent a background check. Claimant was then interviewed by a representative of respondent and was hired. Claimant then filled out a W-4 and was provided a package of papers from respondent which claimant described as a new employee package.[1]

After he was hired, claimant was advised by respondent as to how many hours he was authorized to work with Mr. Anderson and the hourly rate of pay. Claimant testified that he worked 40 hours per week and was paid at the rate of $10.00 per hour. The actual work schedule was then determined between claimant and Mr. Anderson. Claimant would fill out a time sheet, submit it to Mr. Anderson for verification and then mail it to respondent. Claimant was paid by respondent bi-monthly, with the appropriate employment taxes being taken out by respondent. Claimant acknowledged that the program was self-directed care for Anderson, with respondent only visiting the actual site once per year. Mr. Anderson also had a case worker from respondent. This case worker would work with Mr. Anderson to determine what type of services Mr. Anderson was to receive. When the case worker would visit, she would talk to Mr. Anderson and occasionally talk to claimant and provide suggestions as to the services provided Mr. Anderson. Most of the contact was between Mr. Anderson (the client) and respondent. Claimant was to keep the actual contact with respondent to a minimum.

[1] P.H. Trans. at 11.

Claimant had the right to seek other clients while caring for Mr. Anderson, and for a short time did care for a next-door neighbor. Claimant applied with and was hired by a separate agency to care for that individual. This only lasted for about one month in 2006.

Mr. Anderson suffered from aseptic bone necrosis in his hips and shoulders, had undergone bilateral hip replacements, had osteoarthritis in his knees, suffered from asthma and sleep apnea, and had heart problems. Mr. Anderson was described as being 5 foot 7 inches tall and weighing about 500 pounds. He was confined to a wheelchair. He could only ambulate on his own a few steps. Mr. Anderson also received periodic care from his mother and father and was visited monthly by nurses who would draw blood and check the edema in his legs. Claimant assisted in the normal activities of daily living and would drive Mr. Anderson when it was necessary for them to leave the home. Mr. Anderson had a hobby involving pyrotechnics, making firecrackers and other explosives. Claimant did not assist Mr. Anderson with the pyrotechnic activities. Claimant did, on an occasion, discuss the possibility of getting rid of the explosives.

On May 12, 2008, claimant was outside in his van, which was in the driveway of Mr. Anderson's residence, at about 10:00 p.m. when he heard a loud explosion. The storm door to the residence had been blown off its hinges and landed in the front entryway. Claimant ran into the residence and observed smoke and insulation raining down from the ceiling. When claimant saw Mr. Anderson, he was in his wheelchair and he was alive. Mr. Anderson had suffered serious injuries to his hands and his face, with his fingers basically being blown off on both hands. Mr. Anderson's electric wheelchair would not maneuver around the debris on the floor and by this time, Mr. Anderson was not conscious. Claimant was not sure if Mr. Anderson was still alive, but he tried to get him out of the residence. Mr. Anderson slid out of the wheelchair, and claimant tried to drag him out of the residence but was not able to do so. Claimant grabbed Mr. Anderson's medications and threw them into the van. He then told a next-door neighbor to call 911 and went back into the residence with another neighbor to drag Mr. Anderson out of the residence, but they were unable to get Mr. Anderson out. A second explosion blew claimant and the neighbor out of the residence, and claimant suffered extensive burns over 19 percent of his body. Claimant removed his burning pants and tried to return to the residence, but, by this time, fire and rescue had arrived and claimant was prohibited from returning to the residence. Claimant suffered second and third degree burns to his eyes, ears, face, chest, forearms and thighs. He was hospitalized for approximately nine days and underwent extensive medical treatment for his injuries. Mr. Anderson died of his injuries.

PRINCIPLES OF LAW AND ANALYSIS

The ALJ determined that claimant was an employee of respondent and awarded medical, psychological and disability benefits to be provided by respondent and its insurance company. Respondent contends claimant was an independent contractor or, in the alternative, an employee of Mr. Anderson.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

The primary test used by courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.[6]

---

[2] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2007 Supp. 44-501(a).

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Id*. at 102-103.

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price;

2. The independent nature of the worker's business or distinct calling;

3. The employment of assistants and the right to supervise their activities;

4. The worker's obligation to furnish tools, supplies and materials;

5. The worker's right to control the progress of the work;

6. The length of time that the worker is employed;

7. Whether the worker is paid by time or by the job; and

8. Whether the work is part of the regular business of the employer.[7]

Claimant filled out an application for employment with respondent, provided copies of his drivers license and social security card and underwent a background check before being hired by respondent. After the hire, claimant filled out a W-4 for tax purposes and met with a representative of respondent rather than undergoing a formal orientation. Claimant filled out a new employee package provided by respondent and was told by respondent the number of hours he could work and the hourly rate of pay. When claimant completed his work, he provided a time sheet to Mr. Anderson, which was verified and sent to respondent. His paycheck was provided by respondent bi-monthly with the appropriate taxes withheld, and claimant was provided a W-2 at the end of each year. When respondent attempted to reduce claimant's hours with Mr. Anderson, claimant was required to provide information regarding the duties he performed in his care position for Mr. Anderson. Clearly, the type of service being provided by claimant was a part of respondent's regular business. This Board Member finds that claimant was an employee of respondent. The decision of the ALJ on this issue is affirmed.

Respondent argues that claimant abandoned his employment when he went back into the residence to try to rescue Mr. Anderson. It is true that claimant was not a trained paramedic or firefighter. But to argue that a person responsible as a caregiver for years should simply stand by while his patient and long-time friend burns is heartless. It is also

---

[7] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

disingenuous to argue that a caregiver's responsibilities end the minute danger arrives. Respondent's appeal on this issue is rejected.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Respondent contests the award of medical and psychological treatment and the award of TTD.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[8]

The Board does not take jurisdiction over an ALJ's determination of a need for medical or psychological treatment or the entitlement to TTD from an appeal of a preliminary decision. Respondent's appeal of these issues is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

---

[8] K.S.A. 44-534a(a)(2).

[9] K.S.A. 44-534a.

CONCLUSIONS

The ALJ did not exceed her jurisdiction in determining that claimant was an employee of respondent on May 12, 2008, and that the injuries suffered by claimant on that date arose out of and in the course of his employment with respondent. Claimant was an employee of respondent. The Preliminary Decision of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated March 27, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June, 2009.

HONORABLE GARY M. KORTE

c: George H. Pearson, Attorney for Claimant
Bart E. Eisfelder, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge